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1 Does the liquidated damages provision of CEMA, RCW
 2 19.190.040(1), establish the causation and/or injury elements of a
 3 claim under the Washington Consumer Protection Act, Ch. 19.86
 4 RCW (“CPA”), as a matter of law or must the recipient of a text
 5 message that violates CEMA first prove injury in fact before he
 6 or she can recover the liquidated damage amount?

6 **II. FACTUAL AND PROCEDURAL BACKGROUND**

7 This is a putative class action initiated by Kenneth Wright against Lyft, Inc. alleging
 8 violations of the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”),
 9 CEMA, and the CPA, based upon Wright’s alleged receipt of a commercial electronic text
 10 message. Lyft denies the allegations,

11 On January 6, 2015, the Court granted Lyft’s motion to stay the case under the doctrine
 12 of primary jurisdiction pending rulings from the Federal Communications Commission (ECF No.
 13 40).

14 On October 27, 2015, the Court lifted the stay and set a briefing schedule for Lyft’s
 15 motion to dismiss under Fed. R. Civ. P. 12 (ECF No. 52).

16 On April 15, 2016, the Court granted in part and denied in part Lyft’s motion to dismiss
 17 as set forth in the Court’s order of that date (ECF No. 63).

18 Meanwhile, on April 22, 2016, in *Gragg et al. v. Orange Cab et al.*, Case No. 2:12-cv-
 19 00576-RSL (W.D. Wash.), Judge Lasnik issued an “Order Denying Motion for Certification
 20 Under § 1292(b) and Certifying Issues to Washington Supreme Court.” *Id.* (ECF No. 186) (copy
 21 attached hereto). The *Gragg* case involves different parties but encompasses legal issues under
 22 CEMA and the CPA that are substantially similar to the legal issues presented in this case. The
 23 questions certified to the Washington Supreme Court by Judge Lasnik are the same questions on
 24 which the parties now request certification in this motion.

25 On May 4, 2016, Judge Pechman stayed this case pending resolution of the questions that
 26 Judge Lasnik certified to the Washington Supreme Court in *Gragg*. (See ECF No. 65). The

1 Court directed the parties to notify the Court within 7 days of the filing of the answers to the
 2 certified questions by the Washington Supreme Court.

3 On January 31, 2017, the parties in *Gragg* filed an Unopposed Motion for Preliminary
 4 Approval of Class Action Settlement along with a copy of the class action settlement agreement.
 5 *See Gragg*, No. 2:12-cv-00576-RSL (W.D. Wash.), ECF No. 198, 199. In light of the settlement
 6 in *Gragg*, it is unlikely that the Washington Supreme Court will act upon the certification of
 7 issues entered by Judge Lasnik in that case. The parties in this case now respectfully request that
 8 this Court certify to the Washington Supreme Court the questions that previously had been
 9 certified by Judge Lasnik in *Gragg*. As Judge Lasnik stated, “obtaining the input of the state’s
 10 highest court will ensure that this case proceeds to judgment (and through any appeal) on a firm
 11 legal footing.” *Gragg*, No. 2:12-cv-00576-RSL (W.D. Wash.), ECF No. 186 at p. 3:2-4.

12

13 **III. LEGAL ANALYSIS**

14 This Court may certify a question to the Washington Supreme Court when “it is
 15 necessary to ascertain the local law of this state in order to dispose of [a] proceeding and the
 16 local law has not been clearly determined.” RCW 2.60.020. The certification process is designed
 17 to “build a cooperative judicial federalism” and serve the interests of judicial efficiency and
 18 comity. *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741 (1974). Use of the
 19 certification procedure “rests in the sound discretion of the federal court.” *Id.*

20 Certification is appropriate where, as here, there is no appellate authority interpreting a
 21 statute at issue. *See Perez-Farias v. Global Horizons, Inc.*, 668 F.3d 588, 589 (9th Cir. 2011)
 22 (certifying question under RCW 2.60.020 where “[n]o published decision of either the
 23 Washington Supreme Court or the Washington appellate courts has interpreted the relevant
 24 provisions of this statute to date, and the answers to the certified question are ‘necessary . . . to
 25 dispose of’” the matter). Furthermore, certification is especially appropriate where, as here, the
 26

1 state law issues have “significant policy implications.” *Id.* at 593; *see also McKown v. Simon*

2 *Prop. Grp. Inc.*, 689 F.3d 1086, 1091 (9th Cir. 2012) (noting also that “[w]e have previously

3 certified questions to the Washington Supreme Court where a question of law has not been

4 clearly determined by the Washington courts and where the answer to [the] question is outcome

5 determinative” (internal quotation omitted)). Here, certification of the proposed questions to the

6 Washington Supreme Court is appropriate. *Cf. Paz v. Sakuma Bros. Farms Inc.*, Case No. 2:13-

7 cv-0198-MJP (Pechman, J., Oct. 10, 2014), Dkt. #42 (certifying questions to Washington

8 Supreme Court because no Washington appellate authority addressed questions with significant

9 implications for thousands of workers and employers in Washington State).

10 The Court previously determined that it was appropriate to stay this case until the

11 Washington Supreme Court addressed the issues certified in *Gragg*. Because the Washington

12 Supreme Court will not reach those issues in *Gragg*, those issues should be certified to the

13 Washington Supreme Court in this case.

14 **IV. CONCLUSION**

15 For the foregoing reasons, the parties respectfully request that the Court certify the

16 following questions to the Supreme Court of Washington:

17 Does the recipient of a text message that violates the Consumer
 18 Electronic Mail Act, Ch. 19.190 RCW (“CEMA”), have a private right
 19 of action for damages (as opposed to injunctive relief) directly under
 that statute?

20 Does the liquidated damages provision of CEMA, RCW
 21 19.190.040(1), establish the causation and/or injury elements of a
 22 claim under the Washington Consumer Protection Act, Ch. 19.86
 23 RCW (“CPA”), as a matter of law or must the recipient of a text
 message that violates CEMA first prove injury in fact before he or she
 can recover the liquidated damage amount?

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RESPECTFULLY SUBMITTED this 9th day of February, 2017.

BYRNES KELLER CROMWELL LLP

By/s/ Bradley S. Keller

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By/s/ Keith D. Petrak

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 9th day of February, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel on record in the matter.

/s/ Donald W. Heyrich
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ATTACHMENT:

Order Denying Motion for Certification Under § 1292(b)
and Certifying Issues to Washington Supreme Court,
Gragg et al. v. Orange Cab et al., Case No. 2:12-cv-00576-
RSL (W.D. Wash.) (Lasnik, J.) (ECF No. 186)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TORREY GRAGG, on his own behalf and
on behalf of other similarly situated persons,) No. C12-0576RSL
Plaintiffs,)
v.) ORDER DENYING MOTION FOR
ORANGE CAB COMPANY, INC., *et al.*,) CERTIFICATION UNDER § 1292(b)
Defendant.) AND CERTIFYING ISSUES TO
WASHINGTON SUPREME COURT

This matter comes before the Court on defendants' motion to certify an interlocutory appeal to the Ninth Circuit regarding the Court's determination that CEMA's liquidated damages provision satisfies the injury and causation elements of plaintiffs' CPA claim. Dkt. # 165.¹

Pursuant to 28 U.S.C. § 1292(b):

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is

¹ Having reviewed the memoranda submitted by the parties and the remainder of the record, the Court finds that this matter can be decided without oral argument.

ORDER DENYING MOTION FOR CERTIFICATION
UNDER § 1292(b) AND CERTIFYING ISSUES TO
WASHINGTON SUPREME COURT

1 made to it within ten days after the entry of the order: *Provided, however,* That
 2 application for an appeal hereunder shall not stay proceedings in the district court
 3 unless the district judge or the Court of Appeals or a judge thereof shall so order.

4 “[T]he legislative history of 1292(b) indicates that this section was to be used only in
 5 exceptional situations in which allowing an interlocutory appeal would avoid protracted and
 6 expensive litigation.” In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir.1982).
 7 While the appeal need not have a final, dispositive effect on all issues raised in the litigation, the
 8 district court must be of the opinion that it would “materially advance the ultimate termination of
 9 the litigation.” Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681 (9th Cir. 2011).

10 That is not the case here. The Ninth Circuit previously declined to hear interlocutory
 11 appeals regarding the dismissal of plaintiff’s TCPA claim and the certification of a class in this
 12 action. In addition, the Court has found that defendants violated CEMA, but that the violation
 13 can be remedied only through injunctive relief under that statute, not by an award of damages.
 14 Interlocutory review of only one prong of the Court’s CPA analysis will not materially advance
 15 the ultimate termination of the litigation and all but guarantees multiple appeals. The request for
 16 certification under § 1292(b) is therefore DENIED.

17 The Court has *sua sponte* considered whether certification of the state law issues to the
 18 Washington Supreme Court is warranted. Pursuant to RCW 2.60.020, “[w]hen in the opinion of
 19 any federal court before whom a proceeding is pending, it is necessary to ascertain the local law
 20 of this state in order to dispose of such proceeding and the local law has not been clearly
 21 determined, such federal court may certify to the supreme court for answer the question of local
 22 law involved and the supreme court shall render its opinion in answer thereto.” The certification
 23 process serves the important judicial interests of efficiency and comity: as noted by the United
 24 States Supreme Court, certification saves “time, energy and resources and helps build a
 25 cooperative judicial federalism.” Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

26 The Court finds that this matter involves dispositive issues of first impression regarding
 ORDER DENYING MOTION FOR CERTIFICATION
 UNDER § 1292(b) AND CERTIFYING ISSUES TO
 WASHINGTON SUPREME COURT

1 the interpretation of CEMA and the interplay between CEMA and the CPA. Although the Court
2 has already expended “time, energy and resources” considering these issues, obtaining the input
3 of the state’s highest court will ensure that this case proceeds to judgment (and through any
4 appeal) on a firm legal footing. This matter will therefore be presented for expedited review
5 pursuant to RCW 2.60.020. The following questions are hereby certified to the Supreme Court
6 of Washington:

7 Does the recipient of a text message that violates CEMA have a private right of
8 action for damages (as opposed to injunctive relief) directly under that statute?

9 Does the liquidated damages provision of CEMA, RCW 19.190.040(1), establish
10 the causation and/or injury elements of a CPA claim as a matter of law or must the
11 recipient of a text message that violates CEMA first prove injury in fact before
he or she can recover the liquidated damage amount?

12 The Clerk of Court is directed to submit to the Supreme Court of Washington certified copies of
13 this Order, a copy of the docket in the above-captioned matter, and Dkt. # 44-51, 54, 151, 152,
14 155-59, and 162-164. The record so compiled contains all matters in the pending cause deemed
15 material for consideration of the state law questions certified for answer.

16 The defendant in this action is designated as the appellant before the Supreme Court of
17 Washington. The Clerk of Court shall notify the parties as soon as possible, but no more than
18 three days, after the above-described record is filed in the Supreme Court of Washington. The
19 parties are referred to state RAP 16.16 for additional information regarding procedure before the
20 Supreme Court.

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ORDER DENYING MOTION FOR CERTIFICATION
UNDER § 1292(b) AND CERTIFYING ISSUES TO
WASHINGTON SUPREME COURT

The Court will consider plaintiff's second motion for reconsideration (Dkt. # 168) when it is fully briefed. The remainder of the case is hereby STAYED until the Supreme Court of Washington answers the certified questions.

Dated this 22nd day of April, 2016.

Mrs Casnik

Robert S. Lasnik
United States District Judge

ORDER DENYING MOTION FOR CERTIFICATION
UNDER § 1292(b) AND CERTIFYING ISSUES TO
WASHINGTON SUPREME COURT